86-962

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HUTCHINSON, ET AL.,

Petitioners,

v.

MARGARET MILLER, ET AL.,

Respondents.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTARY APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOHN E. SUTTER,
Suite 805,
10 E. Baltimore Street,
Baltimore, MD 21202,
Telephone: (301) 539-1122,

JOHN R. MITCHELL,
605 Virginia Street East,
Charleston, WVA 25301,
Telephone: (304) 346-0307,

Attorneys for Petitioners,
John Hutchinson,
William Reese,
Leonard Underwood.

The Daily Record Co., Baltimore, MD 21202

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United States Court of Appeals
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Filed
9/5/86

No. 85-1548

John Hutchinson, et al.,
Appellants,

versus

Margaret D. Miller, etc., et al.,
Appellees,

and

Cherrie Lloyd,
Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
Charles H. Haden, II, District Judge

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Phillips and Judge Gordon, Senior United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN,
Clerk.

In The
United States District Court for the
Southern District of West Virginia

Filed
7/19/86

Civil Action No. 83-2108
VOLUME XIV

John Hutchinson, et al., Plaintiffs,

v.

Margaret D. Miller, et al., Defendants,

Charleston, WV

May 2, 1982

Before: The Honorable Charles H. Haden, II, Judge

THE COURT: All right.

Thank you.

First, I would like to thank counsel. I think you at this point in the case have presented very excellent arguments and have analyzed the situation that brings us here at this time to consider whether or not this case shall proceed and go to a jury.

I appreciate the comments of counsel on both sides.

The matter before the court now is whether or not the case should go forward and defense or some defendants put on their side of the case or whether the Court as a matter of law should take this case from the jury and enter a judgment for some or all of the defendants.

The causes of actions that have been alluded to here in this case, the third amended complaint is made up of three counts; the three counts all sound in conspiracy, and thus obviously everyone is putting their attention to the question of whether or not conspiracy has been proven by a preponderance of the evidence in this case and whether the elements of a conspiracy have been sufficiently proven to allow this case to go further.

Count number three, the so-called RICO count, is the count in which the defendants are alleged to be members of an enterprise to do an unlawful act under the

requirements of that statute, which would require the proof of at least two violations of federal law. Again, it is found under 18 United States Code, Section 1962(d) and in a conspiracy charge.

I would agree with defense counsel in this case that there has been absolutely no proof in this case that would allow the Court to consider the RICO count of the complaint, which is count number three of the complaint, and I strike it from the evidence of the case and judgment will be entered for the defendants in the case.

As to count number one, count number one is the other count that gives this Court jurisdiction to hear the controversy that comes before it. It is a count sounding in an allegation of deprivation of constitutional rights of the three plaintiffs in this case, and it, too, alleges a conspiracy under the civil rights statute enacted by Congress shortly after the adoption of the 14th Amendment post the civil war, 42 United States Code, Section 1983, with allusions also made to Section 1985(3).

Both of these sound in a conspiracy, and it is necessary in a case like this that the plaintiffs prove that they have been deprived of a constitutional right recognized under the federal constitution and laws before they would have a federal cause of action.

In addition to that, the plaintiffs have pled a companion charge which is a West Virginia common law conspiracy, and that charge is only in this court and is only given consideration by this Court in the event that a federal cause of action is sustained, and it gives the plaintiff opportunity to recover either under a West Virginia cause of action and one or more federal causes of action. So with that in mind, the Court proceeds further on this.

It is also obvious in this case from the allegations, from the proof offered in damages in this case by the plaintiffs

that the plaintiffs here assert in this court not as voters disenfranchised of a particular right but as persons who occupy a special particular category, that is, as persons who were candidates for election and who alleged that their property right as to an office that they lawfully won has been unconstitutionally taken from them by reason of this civil rights conspiracy. So they sue as a defeated or disenfranchised candidate rather than as a disenfranchised voter.

Now, it has been mentioned early on in the case and there has been some controversy as to whether or not the burden of proof in this case when fraud is charged in this case is to the standard recognized in West Virginia as clear and convincing, which is a high standard of proof, or whether it is to a standard recognized in civil cases generally by a preponderance of the evidence.

Now, focusing on the federal cause of action, 42 United States Code, Section 1983 and 1985(3), that federal cause of action, the Court holds that it is compelled to judge this case on the lesser standard of whether the plaintiffs can prove their case by a preponderance of the evidence, and that that is the federal standard and the controlling standard.

On the other hand, as to West Virginia common law conspiracy, such as it directly involves proof of fraud, the standard would be under West Virginia law clear and convincing.

Now, as has been conceded by defense counsel in this case, at this point the Court must look to the evidence that was presented in this case and resolve every inference in the evidence that can be reasonably drawn from the evidence favorable to the plaintiffs' side of the case before making any determination that the plaintiffs have failed to prove their case. The Federal Rules of Civil Procedure so require it, and the Court proceeds on that basis.

The Court adds also one other evidentiary rule which is quite important in a case like this involving public officials, and that is that public officials are presumed to discharge their duties properly and lawfully, and that is a mere presumption in the law and it can be overcome by the evidence in this case by a preponderance of the evidence, if such is offered.

But on points where the evidence is silent as to whether or not a public official discharged his or her responsibilities lawfully and properly, and no evidence has been offered to contradict it, then, of course, the presumption would carry today.

Now, with that in mind, the Court is to make an analysis here of whether or not the plaintiff basically has proved a case under 42 United States Code, Section 1983 and established a conspiracy sufficient by a preponderance of the evidence at this point and sufficient to take this case to a jury and let the case proceed.

Now, in order to prove a conspiracy under the civil rights law, it is necessary that there be state action involved. Obviously, the defendants or several of the defendants in this case are public officials or public employees, and the others who are not such are alleged to be acting in concert with them. So the state action requirement of the civil rights law is satisfied.

Likewise, the defendants who were public employees or public officials were acting under color of law, so a cause of action is stated. The question is whether or not now the defendants in concert deprived the plaintiffs of a constitutional right.

I have identified the constitutional right that the plaintiffs say is involved.

And secondly, whether that was done intentionally.

Now, as to the proof of the conspiracy, there are four things that must be proven to satisfy a conspiracy, and each must be proved.

And that is, first, the agreement between two or more persons to accomplish an unlawful object or to accomplish a lawful object in an unlawful manner.

Secondly, that the object itself be identified.

Thirdly, that in pursuant of the execution of that conspiracy that one or more overt acts occur, and that means simply that something be done in furtherance or an act be done to bring about the success of the conspiracy.

And finally, that the plaintiffs suffer actual harm or actual damages.

Now, throughout this case, from the standpoint of first the pleading and then proof at this trial, there has been a great difficulty in asserting the plaintiffs' case.

As Mr. Winter said, the judge who handled this case before this judge did, that is, Judge Copenhaver, and before it was transferred to this Court, had occasion to pass upon many of the pleading aspects of the case.

Judge Copenhaver held that the case was only minimally sufficient to survive motions to dismiss as to whether or not a cause of action was stated in any one of three of the matters contained in the complaint.

Then when we get to this point in the trial, you have to go further, and it is whether or not a cause of action was stated and here proven sufficient to take this case to the jury.

Now, a basic problem in this case throughout has been what was the alleged conspiracy.

A second basic problem has been what harm, if any, assuming the existence of the conspiracy, has been proven by the plaintiffs.

As the evidence in this case progressed, and dissimilar to the pleading in this case, it became apparent that part of the conspiracy that the plaintiffs allege, that is, CES's and the county commission's and the county clerk's alleged involvement in the purchase of the CES electronic system in 1978 and 1979 was not a part of any conspiracy in this case.

It was originally asserted to the Court that the conspiracy was that the county clerk would convince the county commission to purchase an electronic voting system in 1978 in order to have at hand a system that would be sufficient to manipulate and rig an election to be held in 1980, thus resulting in the alleged outcome which has been asserted in this case.

And, of course, some evidence was adduced at some early period during the trial of this case and then the county commissioners were voluntarily dismissed out of the case at that time. And that part of the alleged conspiracy was abandoned.

From that point forward, the evidence in this case has focused on what occurred in that period of time immediately before the general election of 1980 beginning somewhere around October 17th with the time of the testing of the electronic voting system for the general election and then concluding again on the night that the unofficial results were tabulated or what is known in common parlance as election day on November 4th and into the early hours of November 5th and then commencing again with our attention to what occurred at the canvass commencing on November 10th but actually beginning in earnest on November 17, 1980, and then, of

course, the alleged matters that occurred in between the night of the general election and the canvass of November 17th.

Now, it has been suggested strongly by defense counsel in this case, and the Court agrees it is true, that if the proof of a conspiracy fails in this case every aspect of the cause of action and every defendant in this case is exonerated by reason of the passage of the statute of limitations.

The causes of action asserted in this case are controlled by a two-year statute of limitation. The statute of limitation begins to run when the plaintiffs discover an alleged harm or injury and thus are put on notice that they have a right to do something to remedy that harm or injury.

The evidence is clear in this case that the discovery of the alleged harm or injury occurred as early as November 6 or 7, 1980, and as late as December 8 or 10, 1980, when Mr. Underwood initiated his cause of action questioning the method employed in the recount and questioning the outcome of the canvass insofar as his race was concerned.

And as counsel are well aware, the only date that keeps this case alive in this court is the alleged last act of the conspiracy which was supposed to have occurred sometime on or about February 8, 1981; and this action was brought in February 1983, and so if that is the last act of the conspiracy, that would be sufficient to keep this cause of action alive in this court.

So again we go back to the basis of whether or not a conspiracy has been proven in this case sufficient to withstand the motion for directed verdict.

Now, plaintiff counsel suggests to me, as he has urged throughout this case, that, judge, the law should be

molded to accommodate a situation where proof is difficult if not impossible to produce.

Well, I would suggest to plaintiffs' counsel that the law can accommodate that if legislatures choose to make it so or if an appellate court determines that the law is different than what we have apprehended it to be on prior occasions.

But a federal district court is a trial court, and a federal district court is compelled to follow the law as it has been decided by the appellate courts and enacted by, in this case, the United States Congress, and where applicable by the West Virginia Legislature, and this Court recognizes its obligation and function.

Now, the leading case on civil conspiracy is the case that by now all counsel have made reference to, and that is the *Halberstam v. Welch* case, 705 Fed. 2d at page 472 (D.C. Cir. 1983).

Another case of significance is the case referred to both by Mr. Mitchell in his closing arguments and also by Mr. Wood, and that is *Hampton v. Hanrahan,* 600 Fed. 2d 600, (7th Cir. 1979), and what those cases stand for.

Now, in each of those cases, and in the *Halberstam* case, particularly, which the Court gives greater weight to because it is a very thorough analysis of the problem, the Court says there that under certain circumstances the existence of the conspiracy may be inferred from the association of the parties, from the alleged harm, from some of the overt acts.

But there is an important distinction in that case and in the other cases that have been cited to me from the fact situation that we have here in this case.

In the fact situation in the *Halberstam* case, the object of the conspiracy occurred and it was clear and precise that it

had occurred because it was a situation arising out of a robbery of a prominent person living in the Washington area which resulted in the killing and death of that prominent person. The robber was found to be a person who had been an accomplished burglar over quite a period of years and one who had accumulated a great amount of wealth over a period of time.

The interesting aspect which made this a civil conspiracy case was that he had chosen to live in with a companion over a period of years, and she was alleged in the civil conspiracy in a wrongful death action brought by the widow of the deceased criminal victim to be a co-conspirator with the robber in the criminal conspiracy of accomplishing burglaries which among other things resulted in injury and violence.

And that whole case had to do with whether or not the live-in companion could be held liable with the robber for the loss occasioned by the death of the deceased victim to compensate his estate.

Clearly, in that case and clearly in the other cases cited in the *Halberstam* case, the injury and the object of the conspiracy was known and apparent, and then the question was did certain persons cause that injury and damage.

That is a far different situation than we have facing us here because here we have an officially certified election officially certified on some time in December 1980 which reflected clearly and precisely that the three plaintiffs in this case lost this election. And in the instance of two of the three plaintiffs the loss was very significant, very large.

In the instance of one of the plaintiffs, one of the plaintiffs was counted out, so to speak, in the canvass which occurred after the unofficial results were available.

I think he was several votes ahead on the night of the unofficial results, and when the challenges and the absentees and the mutilated ballots were allowed or disallowed by the canvass he came up seven votes short, and assumed 14th place in a 13-man race for House of Delegates.

In the other instance, the evidence offered here would only substantiate that the plaintiffs clearly lost the election and that the result of the election was none other than a lawful, certifiable result of an election.

In that regard, the quality of the evidence that has been presented in this case has referred only to the precincts in the First District of Kanawha County, and this has very much significance to the Court. Those are several significant precincts, obviously, and as any precinct is in any county, but there are 274 precincts in Kanawha County, and these are few in number compared to the entire county; there are four other districts.

No evidence, no verbal evidence was offered at any time during the course of this election, no evidence except this large exhibit showing the results of the canvass, would reflect what happen in the other four districts of Kanawha County.

Likewise, in the plaintiff Mr. Hutchinson's race, no evidence is reflected in this case as to what happened in the other 12 or 13 counties which comprise the third congressional district.

So we focus this entire case as to whether or not something went wrong in one aspect or in several precincts of the First District and whether the election could have been won if the First District outcome had been different.

Well, that ignores a burden that is placed on the plaintiffs in this case. As Mr. Winter points out in this case, this cause of action is not actionable if all that is involved are mere election irregularities. This cause of action is actionable from a constitutional standpoint if the plaintiffs can produce evidence to show that the election as conducted was fundamentally unfair, and that would involve a constitutional right aside and apart from the citation of the 1943 U.S. Supreme Court case in *Snowden*.

And if the plaintiffs had been able to prove to this Court's satisfaction that the election involved was fundamentally unfair or would be able to at a later time prove to the jury, there would be no question that they would have met their burden insofar as satisfying the constitutional right.

But as has been variously suggested in this case, and we will get back to what was the agreement about, it has been stated broadly it was to rig the 1980 election.

And I have analyzed this evidence from every aspect that I can, and I find that the only evidence that the 1980 election was rigged is purely speculative in nature, it was mere suspicion; and it does not form the basis for the Court to draw a reasonable inference favoring the plaintiffs in this case to infer as *Halberstam* would allow under only certain circumstances to infer that a conspiracy may be present and that certain persons were a member of that conspiracy.

In that respect, as to the object of the conspiracy, one of the particular defendants in this case that has been charged in this case was the successful candidate in 1984 to the United States Congress, Mr. Staton, he was identified only by a plaintiff's counsel in this case as the object of a conspiracy.

That came as a surprise to the Court because as Mr. Mitchell and counsel in this case know, the object of a conspiracy does not make one thereby a conspirator, assuming the existence of a conspiracy, and that did not make one an unlawful participant or a co-conspirator.

Obviously, Mr. Staton would have to be dismissed from this case both from the standpoint of proof and from the standpoint of the assertions made by counsel as early as opening statement in this case.

But essentially what I am saying is that in analyzing all the evidence I find that the proof of the conspiracy in this case falls on two bases, and one basis as to all three plaintiffs in the case, and that is that the plaintiffs have never proven the existence of a conspiracy or these defendants' membership in a conspiracy.

They have never offered proof in this case which is required that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences.

Nowhere in this case has there been evidence offered that there was a single plan involved made known to each one of the defendants in this case. I might say this to particular defendants, Mr. Cline, representing the four persons who are employees of the county clerk, they are alleged to be guilty or conspirators in this case merely because they were employees and without their presence certain things in the alleged conspiracy could not have been done.

They were never charged nor has any evidence been offered that they were allegedly aware of any plan in this case other than the fact that they merely discharged duties.

Well, it is easy to recognize as black letter law to conspiracy that one does not become a conspirator by being a mere innocent participant in what is the alleged unlawful plan. One has to have knowing and willful intent to join in that conspiracy at some point during that conspiracy.

No evidence was offered as to those four defendants who are mere employees of the constitutional office of county clerk.

So keep that fact in mind.

The other second basis that this conspiracy falls for two of the three plaintiffs in this case is that Mr. Reese and Mr. Hutchinson offered no evidence in this case that they were harmed by the alleged actions in this case, and that is aside from offering what it cost them to run for office and what the office would have paid for the period of time that they would have occupied it had they won it.

They again did not offer evidence in this court which would have shown under any circumstances that they would have won that election unofficially on November 4, 1980, or at the canvass completion and certification of December 3, 1980. And that makes their case fatally defective. And the Court cannot infer a conspiracy when another of the basic elements of proof of the conspiracy is not satisfied.

Now, inference has been made in this case whether the plaintiffs would have had to show under certain circumstances as to the matter of harm that they would have won, in other words, that what they would have had to prove would be outcome changing. That would appear to be the rule of the *Donahue* case. There are two other cases saying whether or not there is substantial possibility that the outcome would be affected and another one on a sliding burden of proof.

It is apparent to the Court that where the conspiracy itself is not proven that the burden of showing that the outcome sought to be changed that falls on the plaintiffs is accordingly much higher because the Court or a jury would not be given reason to infer from either end of the conspiracy that one had occurred and that these people were members.

Consequently, all we have in this case are a series of unrelated acts that have been proven, most of which have a reasonable and an innocent appearance as easily as they would have a culpable appearance, none of which, in the Court's rulings throughout the presentation of the plaintiffs' case, are attributable to more than one individual or to more than one entity who have been identified as a defendant in this case.

And there are certain things that have been attributable to the defendants Miller, to the defendant CES, certain things attributable to Mr. Roark and the alleged Roark returns, and on those matters I want everyone to keep clearly in mind that these are not individual cases asserted against any one of these defendants but these are cases all alleging conspiracy and saying that all of these defendants joined together to accomplish an unlawful plan or to accomplish a lawful plan in an unlawful manner.

And that is where the proof has failed in this case, and the proof of individual overt acts, however compelling some few of them may appear to be to plaintiffs' counsel, does not suffice for the absence of proof of the conspiracy.

And considering all of these matters, the Court has no choice but to enter directed verdicts for the defendants in this case.

I do so with a great deal of reluctance, although I recognize that at some point in time the Court is obliged to

perform its duty in a case like this. I say I do this with some degree of reluctance because this involved on both sides of this case for the most part, and I am not deprecating Mr. Reese in any way, I just don't know him, and I don't know him to be a public official, but I do know Mr. Hutchinson and Mr. Underwood, and I know the other public officials who are involved in this room, and the public employees. They are respected public officials and have been for their discharge of their offices in the past.

And it is unfortunate, indeed, that this type of litigation has to come to the Court system, but it had to, and I had to be resolved. But the Court does so with an awareness and with a sensitivity to all of those things that are involved in being a candidate for office and being a losing candidate as well as a successful candidate for office at various times.

The Court is aware of the strains and the costs and all of those things that are involved, and the Court is aware and takes in absolute good faith by the persons who assert it that the persons who were and persons who are public servants do so with a view of discharging their duties honestly and properly and with a great deal of reverence for the constitutional system that we all operate under, and for observance of the federal and state laws.

So for all of those reasons, and as I said, because I know the parties, and because I can understand the situation, I find a case like this particularly difficult to handle.

But the Court has no choice but to enter the judgment in this case, and I do so, and will enter the judgment and will direct that the jury be charged.

Thank you, ladies and gentlemen.